United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

SAM DATE: November 9, 2004

TO : Robert H. Miller, Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: California Union of Safety Employees
Case 20-CA-32059

and 339-7575-0100
530-8081-4300
Teamsters Local 228 625-8833-2867-5000
Case 20-CB-12210

These cases were submitted for advice on two issues arising from the Union's campaign to decertify the Employer, also a union, and to become certified as the collective bargaining representative of the single unit of state employees that the Employer represents. The first issue is whether the Employer violated Section 8(a)(5) by refusing to bargain with the Union because the Union's decertification/certification campaign allegedly created a disabling conflict of interest by placing the Union, which represents the Employer's staff employees, in direct business competition with the Employer.[1] The second issue is whether the Union's activity violates Section 8(b)(1)(A) because that same alleged conflict of interest interferes with its single-minded duty to represent the Employer's employees. We conclude that the Union's campaign, which essentially seeks the substitution of itself for the Employer, creates a disabling conflict of interest that privileges the Employer's refusal to bargain. In addition, we conclude that the Union's conduct violates Section 8(b)(1)(A) because it interferes with the Union's single-minded duty to represent the Employer's employees.[2]

FACTS

The California Union of Safety Employees (CAUSE, or Employer) represents a single unit of around 7,000 security

---

[1] See Bausch & Lomb Optical Co., 108 NLRB 1555 (1954).

[2] The Region did not submit the legality of an alleged Union statement to unit employees that it could both employ and represent them if the decertification were successful. Although such a statement may be unlawful in certain circumstances, we need not address that here since it would add nothing to the violation or remedy we are authorizing.

officers (Unit 7) employed by 19 different California state agencies and departments. CAUSE neither represents nor seeks to represent any other employees. In May 2003, the Board certified Teamsters Local 228 (Union) as the exclusive Section 9(a) representative of a unit of around 12 CAUSE employees (the "staff employees") who service the needs of the 7,000 CAUSE members. In fall 2003, the Union and CAUSE began negotiations for an initial collective-bargaining agreement covering the staff employees.

Around June 2004, the Union commenced a campaign to decertify CAUSE as the collective bargaining representative of Unit 7. This campaign includes the Union's solicitation of CAUSE member signatures on dual-purpose cards seeking both the decertification of CAUSE and the certification of the Union as collective bargaining representative of Unit 7. CAUSE also asserts that a Union representative informed a CAUSE staff employee that if the Union succeeded in the decertification/certification campaign, it could simultaneously operate as their employer and continue as their collective-bargaining representative.

CAUSE and the Union have not yet reached an initial collective-bargaining agreement covering the CAUSE staff employees. On August 30, 2004, CAUSE informed the Union that it would no longer bargain because the Union's decertification/certification campaign created a disabling conflict of interest by placing the Union "in direct competition with CAUSE and effectively annul[ling] CAUSE staff members' right to obtain a collective bargaining agreement." In support of its position, CAUSE argues that if the Union successfully decertifies CAUSE as the representative of the 7,000 Unit 7 employees, CAUSE will cease to exist because it represents no other employees.

ACTION

We conclude that the Union's campaign, which essentially seeks the substitution of itself for the Employer, creates a disabling conflict of interest that privileges the Employer's refusal to bargain. We also conclude that the Union's conduct violates Section 8(b)(1)(A) because it interferes with the Union's single-minded duty to represent the Employer's employees.

Fifty years ago, in Bausch & Lomb Optical Co.,[3] the Board recognized that there could be "unusual circumstances" which would privilege a party to refuse to bargain, despite the clear proscriptions of the Act. In Bausch & Lomb, the

[3] 108 NLRB 1555, 1561 (1954).

union representing the employer's employees established and operated a company to engage in the same business and locality as the employer, thus becoming one of its direct competitors. The Board held that the employer need not bargain with the union due to the "innate danger involved" to the collective bargaining process from the union's "special interest."[4] According to the Board, the union's transformation into a business rival:

> [D]rastically change[d] the climate at the bargaining table from one where there would be reasoned discussion in a background of balanced bargaining relations upon which good-faith bargaining must rest to one in which, at best, intensified distrust of the [u]nion's motives would be engendered.[5]

The Board emphasized that good faith bargaining requires that a bargaining representative owe complete and undivided loyalty to the party he represents.[6] Otherwise, the excessive demands unions normally make during negotiations could be made in bad faith to drive the employer out of business and deprive employees of their jobs and union representation.[7] The Board refused to allow such a result, or to compel the employer to determine whether each excessive demand is made in good faith.[8] It held that the latent danger that the union would misuse its position, even if currently unrealized, made "fair dealing with the [employer] inherently impossible," privileging the employer to refuse to bargain with the union.[9] The Board still applies this standard in determining whether a party may refuse to bargain with an opposing party's representative.[10]

We conclude that this long-standing precedent privileges the Employer's refusal to bargain with the Union. The Union's campaign to decertify the Employer as the

---

[4] Id. at 1559.

[5] Id. at 1561.

[6] Id. at 1559 (citing Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953)).

[7] Id. at 1560.

[8] Id. at 1561.

[9] Id. at 1562.

[10] See Alanis Airport Services, 316 NLRB 1233, 1233 (1995).

collective bargaining representative of the Unit 7 employees is a direct threat to the Employer's existence. The Employer is a labor union that does not represent any other employees. Nor does it seek to represent any employees other than the 7,000 members of Unit 7. If the Unit 7 members decertify it, the Employer, as an entity, will likely cease to exist. Since the Union is leading the campaign to decertify the Employer, their interests in the "business" of representing a particular unit are in direct competition. Therefore, the Union's activity presents an "innate danger" to the collective bargaining process because of the Union's "special interest"[11] in causing harm to the Employer.

We also conclude that a major premise of the rationale underlying Bausch & Lomb warrants a conclusion that the Union's campaign activity violates Section 8(b)(1)(A). The Board found that good faith bargaining could not occur between a union in direct competition with an employer because the union's self-interest would interfere with the "complete and undivided loyalty" it owes to the employees it represents.[12] Thus, the Board's analysis of the parties' respective bargaining obligations under Section 8(d) of the Act was based, to a significant degree, on the duty of fair representation owed by a union to its employees. The Board's reliance in Bausch & Lomb on Ford Motor Co. v. Huffman, a seminal case establishing a union's duty of fair representation, underscores that point.

The Board has applied this analysis to find that a union with a conflict of interest violates Section 8(b)(1)(A). In St. Louis Labor Health Institute,[13] the Board upheld the ALJ's conclusion that a union violated Section 8(b)(1)(A) because it could not represent the employees in collective-bargaining when the union exerted a significant degree of control over the entity employing the employees. The ALJ reasoned that the union was "not qualified" to act as a collective-bargaining representative if it was "unable to approach negotiations with the single-minded purpose of protecting and advocating the interests of the employees who have selected it as their bargaining representative."[14]

---

[11] Id. at 1559.

[12] Id. (citing Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953)).

[13] 230 NLRB 180, 180 n.1 and 182 (1977).

[14] Id. at 182. See also Teamsters Local 688 Insurance & Welfare Fund, 298 NLRB 1085, 1087 (1990) (union violated

For similar reasons, the Union's campaign here to decertify the Employer and obtain certification as the representative of the Unit 7 employees violates the Union's duty of fair representation to the Employer's staff employees. The Union's efforts to cause the demise of the Employer must, of necessity, be at odds with the interests of the employees it represents who have a direct stake in the Employer remaining as a viable entity.[15] In this regard, we note that the Union never disclaimed interest in representing the staff employees. Therefore, just as the Union's conduct creates a conflict of interest privileging the Employer to suspend negotiations, the Union's self-interest in representing Unit 7 compromises its ability to represent the Employer's staff employees "with the single-minded purpose of protecting and advocating" their interests.[16]

The Union's disabling conflict is not diminished because the Union has not yet been successful in its campaign.[17] The mere conduct of a campaign to remove the Employer as the collective-bargaining representative of the

---

8(b)(1)(A) & (2) resulting from a conflict of interest by seeking to function as bargaining representative of employees of employer fund when officers and agents of the union exerted substantial control over the day-to-day operations of the employer regarding labor and personnel matters).

[15] See Bausch & Lomb, 108 NLRB at 1560 (". . . it is to the direct benefit of the employees and the union which represents them that the employer be able to continue operating the business successfully."). It can be no consolation to the Employer's staff employees that the Union reportedly intends to both employ them and continue as their collective bargaining representative, even assuming such a statement was made, because a union may not lawfully do both. See Butchers Local 115, 209 NLRB 806, 810 (1974) (if the employer and the union were the same, "the union would in effect be bargaining with itself, a situation that would involve a most blatant conflict of interests").

[16] St. Louis Labor Health Institute, 230 NLRB at 182.

[17] See, generally, St. Louis Labor Health Institute, 230 NLRB at 182 and n.9 where, as here, the ALJ found it unnecessary to determine whether actual, versus potential, taint of representation is necessary to find a disqualifying conflict, since the union's conduct in fact constitutes such a conflict.

Unit 7 employees sufficiently attacks the Employer's existence to create a disabling conflict of interest. Thus, regardless of whether the Union succeeds in decertifying the Employer, and regardless of whether the Union succeeds in substituting itself with the Employer, the Union cannot effectively function at the bargaining table as the employees' Section 9(a) representative while the "overt act" of conducting the campaign is ongoing.[18]

Therefore, the Region should dismiss the Section 8(a)(5) charge, absent withdrawal, and issue a complaint, absent settlement, alleging that the Union's campaign violates Section 8(b)(1)(A) of the Act and seeking a traditional cease and desist remedy.

B.J.K.

[18] See Catalytic Industrial Maintenance Co., 209 NLRB 641, 646 (1974) (where union failed in its effort to divert bargaining unit work away from the employer, the overt act of proposing the movement of the work, while not successful, was inconsistent with the union's obligations to the employees in the unit).